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December 19, 2018

**VIA ECFS**

Marlene H. Dortch  
Federal Communications Commission  
445 Twelfth Street, SW  
Washington, D.C. 20554

Re: Notice of Ex Parte Presentation  
*CG Docket Nos. 18-152, 02-278*

Dear Ms. Dortch:

On December 17, 2018, on behalf of Broadnet Teleservices LLC (“Broadnet”), Patrick Halley and the undersigned of Wilkinson Barker Knauer, LLP met with Nicholas Degani and Zenji Nakazawa of Chairman Pai’s office. During the meetings, we reiterated points made in Broadnet’s December 3, 2018 letter with regard to Congress’ intent in enacting the Telephone Consumer Protection Act (“TCPA”) and its application to federal, state, and local government entities.<sup>1</sup> Specifically, we explained that by clarifying that the federal government is not a “person” under the TCPA,<sup>2</sup> the Commission effectuated Congress’ intent with regard to the scope of the TCPA. Declaring that, for purposes of the TCPA’s restrictions, the term “person” *also* does not include state and local government officials – a position entirely unopposed in the record – likewise comports with congressional intent and precedent. Finally, we underscored that while Broadnet’s platform enables telephone calls, it is not the maker of such calls.<sup>3</sup>

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<sup>1</sup> Written Ex Parte Communication of Broadnet Teleservices LLC, CG Docket Nos. 18-152, 02-278 (filed Dec. 3, 2018) (“Broadnet December 3, 2018 Letter”).

<sup>2</sup> See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling, CG Docket No. 02-278, FCC 16-72 (rel. July 5, 2016) (“*Broadnet Ruling*”).

<sup>3</sup> See Notice of Ex Parte Presentation of Broadnet Teleservices LLC, CG Docket Nos. 18-152, 02-278, at 2 (filed July 26, 2018); see also Notice of Ex Parte Presentation of National Consumer Law Center *et al.*, CG Docket Nos. 18-152, 02-278, at 11 (filed Sept. 19, 2018) (“We think there may be merit in this last point: that the service providing the technology that enables the calls by the government to be made is not a caller under the TCPA, and we urge the Commission to analyze whether this position is confirmed by its previous rulings.”).

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The Communications Act’s text suggests that Congress did not intend to apply the term “person” in the TCPA by default to governmental entities. As then-Commissioner Ajit Pai recognized in his statement on the *Broadnet Ruling*, “Congress expressly defined a ‘governmental entity’ as a ‘person’ in other provisions of the Communications Act, but not for the TCPA.”<sup>4</sup> For example, in Section 602 of the Act, Congress specifically defined “person” to mean “an individual, partnership, association, joint stock company, trust, corporation, or governmental entity.”<sup>5</sup> In contrast, in Section 208, Congress referred to “[a]ny person, any body politic, *or* municipal organization, *or* State commission,” indicating that a municipal organization was not subsumed into the “person” category.<sup>6</sup> The TCPA contains no indication that Congress meant for the term “person” to encompass municipal entities for purposes of that legislation – rather, it relies on the Communications Act’s definition of “person,” which includes only an “individual, partnership, association, joint-stock company, trust, or corporation.”<sup>7</sup> Nor does the TCPA’s legislative history.<sup>8</sup>

Federal case law overwhelmingly supports the proposition that whether the term “person” as used in a particular statute encompasses local governments turns on congressional intent, and that, in the TCPA, Congress used “person” to exclude all government authorities. For example, in *Abbott v. Village of Winthrop Harbor*, the U.S. Court of Appeals for the Seventh Circuit found that the federal wiretap act “[a]s written ... does not include a municipality within its definition of ‘person.’”<sup>9</sup> The Seventh Circuit relied on the plain language of the statute, which stated that a “person” includes “any employee, or agent of the United States or any State or political subdivision thereof, and any individual, partnership, association, joint stock company, trust or corporation.”<sup>10</sup> The court found that a municipality is not any of these things,<sup>11</sup> and observed that “[a]bsent a clearly expressed legislative intent to the contrary, the statutory language must be regarded as conclusive.”<sup>12</sup> Like the Wiretap Act, the TCPA does not expressly include municipalities within the class of “persons,” and nothing in the TCPA’s legislative history indicates that Congress intended for the term to encompass such entities. Thus, under *Abbott*’s logic, a municipality is not a person under the TCPA.

<sup>4</sup> *Broadnet Ruling* at 7412 (Partial Dissent of Commissioner Pai).

<sup>5</sup> 47 U.S.C. § 522(15).

<sup>6</sup> *Id.* § 208(a).

<sup>7</sup> *Id.* § 153(39). *See also* Broadnet December 3, 2018 Letter at 5-6; *id.* at 6 n.31 (noting that Section 153 specifically contemplates alternative definitions where the context otherwise requires).

<sup>8</sup> *See* Broadnet December 3, 2018 Letter at 6-7

<sup>9</sup> *Abbott v. Village of Winthrop Harbor*, 205 F.3d 976, 980 (7th Cir. 2000).

<sup>10</sup> *Id.* (quoting 18 U.S.C. § 2510(6)).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* (citing *Milwaukee Gun Club v. Schulz*, 979 F.2d 1252, 155 (7th Cir. 1992)).

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Likewise, in *Walden v. City of Providence*, the U.S. Court of Appeals for the First Circuit interpreted the Rhode Island and federal wiretap acts, and concluded that “both clearly exclude municipalities from the definition of persons.”<sup>13</sup> Like the federal wiretap law, the Rhode Island law defined a “person” to include any “individual, partnership, association, joint stock company, trust, or corporation, whether or not any of the forgoing is an officer, agent, or employee of the United States, a state, or a political subdivision of a state.”<sup>14</sup> In the First Circuit’s opinion, because the statute did not expressly reference municipalities – only their “officer[s], agent[s], or employee[s]” – municipal governments themselves fell outside the definition of “person.”<sup>15</sup>

Further, the fact that the Rhode Island law applies to officers, agents, or employees of government entities does not indicate that, without that language, the law otherwise would apply to the governments themselves: The court did not rely on any specific statutory construction doctrine, but rather found that municipalities were excluded under the statute’s plain and ordinary meaning. Specifically, the court found that the definition of “person” included a list of included entities, and that municipalities were not among those listed. The result would have been no different if the definition had listed only private entities – what mattered was the fact that it excluded municipal entities. If the First Circuit believed that a municipality was an “individual, partnership, association, joint stock company, trust, or corporation,” it would have found that the law applied to municipalities. Instead, the court found that the plain language of the “person” definition in both the Rhode Island and federal wiretap laws “clearly” *excluded* municipalities.<sup>16</sup> The same is true of the Communications Act, which sets out a virtually identical definition.

*United States v. Rancho Palos Verdes* also supports the view that “person” is meant to encompass municipalities only when Congress makes clear that this is its intention.<sup>17</sup> There, the court considered the language of the 1973 Endangered Species Act (“ESA”), which among other things had amended the 1969 Endangered Species Conservation Act (“ESCA”). The ESCA had defined “persons” to include “any individual, partnership, corporation, or association.” The ESA broadened this definition to include “an individual, corporation, partnership, trust, association, or any other private entity, or any officer, employee, agent, department, or instrumentality of the Federal Government, of any State or political subdivision thereof, or any foreign government.” The court explained that the original ESCA definition of “persons” – which largely tracks the Communications Act’s definition – excluded all public entities. Indeed, in the court’s view, even

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<sup>13</sup> *Walden v. City of Providence*, 596 F.3d 38, 60 n.29 (1st Cir. 2010).

<sup>14</sup> *Id.* at 59 (quoting R.I. Gen. Laws. § 12-5.1-1(11)).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 60 n.29.

<sup>17</sup> *United States v. Rancho Palos Verdes*, 841 F.2d 329 (9th Cir. 1988).

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the ESA, which expanded the term's scope to encompass individuals in public roles, still excluded municipal corporations.<sup>18</sup>

In addition, in both *Vill. of Arlington Heights v. Reg'l Transp. Auth.* and *East St. Louis v. Circuit Court for Twentieth Judicial Circuit*, the Seventh Circuit held that municipalities were not "persons" within the meaning of the Fourteenth Amendment.<sup>19</sup> In doing so, the courts effectively took the position that the term "person" by default excludes municipal governmental entities unless there exists clear precedent with regard to a particular law – for example, precedent relying on congressional intent in enacting such law – that counsels otherwise.<sup>20</sup>

Importantly, every case described above was decided *after* the Supreme Court issued its decision in *Monell v. Dep't of Soc. Servs.* – the seminal case establishing that "person" extends to municipal corporations for purposes of the Civil Rights Act of 1871<sup>21</sup> – without ever discussing or distinguishing *Monell*. This is because, as reflected in the discussion above, congressional intent is derived on a statute-by-statute basis. *Monell* relied on congressional intent specific to the Civil Rights Act of 1871, which is not necessarily applicable to other laws enacted by Congress including the Communications Act and the TCPA. Thus, in reversing a prior Supreme Court decision that had held that municipalities were *not* "persons" under that same Act, the Court considered the congressional intent behind that specific law, ultimately finding that its "analysis of the legislative history of the Civil Rights Act of 1871 compels the conclusion that Congress *did* intend municipalities and other local government units to be included among those persons to whom § 1983 applies."<sup>22</sup> As the Court of Appeals for the D.C. Circuit has explained, "the term 'person' as used in section 1985 and related provisions of the Civil Rights Act has been interpreted to include municipalities, but that is because the 'legislative history of the Civil Rights Act of 1871 compels the conclusion that Congress *did* intend municipalities and other local government units to be included among those persons to whom § 1983 applies[.]'"<sup>23</sup> For the same reason, this matter is not governed by *Cook County v.*

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<sup>18</sup> *Id.* at 331.

<sup>19</sup> *Vill. of Arlington Heights v. Reg'l Transp. Auth.*, 653 F.2d 1149, 1152 (7th Cir. 1981); *East St. Louis v. Circuit Court for Twentieth Judicial Circuit*, 986 F.2d 1142, 144 (7th Cir. 1992).

<sup>20</sup> *See Vill. of Arlington Heights*, 653 F.2d at 1152 (quoting *People v. Valentine*, 50 Ill. App. 3d 447, 452 (1977) ("Municipal governmental entities have never been held to be 'persons' within the meaning of the amendment, which was intended to guard the liberty and proper of natural persons and corporations.")).

<sup>21</sup> *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690 (1978).

<sup>22</sup> *Id.*

<sup>23</sup> *Sturdza v. U.A.E.*, 281 F.3d 1287, 1307 (D.C. Cir. 2002) (internal citations omitted).

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*United States ex rel. Chandler*, which evaluated the intent of the Congress that enacted the 1863 False Claims Act.<sup>24</sup>

Ultimately, the judicial precedent discussed above and Congress' choices with regard to the language it used in Section 153 and the TCPA make clear that Congress never intended to apply the TCPA to governmental entities, regardless of whether they are federal, state, or local. The Commission should act now and extend the *Broadnet Ruling*'s finding that the term "person" for purposes of the TCPA's restrictions excludes state and local governments in order to effectuate Congress' intent and thereby enable critical government-to-citizen communications.

Please do not hesitate to contact the undersigned with any questions.

Sincerely,

/s/ Joshua M. Bercu/  
Joshua M. Bercu

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<sup>24</sup> 538 U.S. 119 (2003).